Public Prosecutor v N (A child)

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W–09–10 OF 2003
ALAUDDIN, ABDUL AZIZ AND NIK HASHIM JJCA
13 MARCH 2004

Criminal Procedure — Arrest — Procedure after arrest — Child — Detention of child for investigation — Whether detention of child for purposes of investigation should be under Child Act 2001 or s 117 of Criminal Procedure Code

The question to be decided in this appeal was whether the detention of a child for the purposes of investigation should be under the Child Act 2001 ('the Act') or under s 117 of the Criminal Procedure Code ('CPC'). The High Court judge had ruled that by virtue of s 83(1) of the Act, the arrest and detention of a child must be under the Act and not under s 117 of the CPC.

Held:

Section 117 of the CPC was applicable to a child. If Parliament had intended to prohibit the detention of a child beyond 24 hours for the reason that investigation could not be completed, it would have done so expressly and would not have relied on the word 'detention' in s 83(1) of the Act to include detention for purposes of investigation. Further, s 83(1) of the Act was contained in Part X of the Act that dealt with 'Criminal Procedure in Court for Children' and not for the investigation of offences alleged to be committed by a child. As such, the word 'detention' in s 83(1) of the Act should be construed as not being intended to include detention pending investigation (see paras 21–22).

[**Bahasa Malaysia summary**

Persoalan yang perlu diputuskan dalam rayuan ini adalah sama ada penahanan seorang kanak-kanak bagi tujuan siasatan hendaklah dilakukan di bawah Akta Kanak-Kanak 2001 ('Akta tersebut') atau di bawah s 117 Kanun Acara Jenayah ('KAJ'). Hakim Mahkamah Tinggi telah memutuskan bahawa menurut s 83(1) Akta tersebut, tangkapan dan penahanan seorang kanak-kanak perlu dilakukan di bawah Akta tersebut dan bukan di bawah s 117 KAJ.

Diputuskan:

Seksyen 117 KAJ terpakai ke atas kanak-kanak. Sekiranya Parliamen berhasrat untuk melarang penahanan seorang kanak-kanak melebihi 24 jam oleh kerana siasatan tidak boleh diselesaikan, ia patut telah dilakukan dengan nyata dan tidak akan bergantung kepada perkataan 'detention' dalam s 83(1) Akta tersebut untuk memasukkan penahanan bagi tujuan siasatan. Tambahan pula, s 83(1) Akta tersebut mengandungi Bahagian X kepada Akta tersebut yang membincangkan tentang 'Criminal Procedure in Court for Children' dan bukan untuk siasatan kesalahan-kesalahan yang dikatakan telah dilakukan oleh seorang kanak-kanak. Oleh itu, perkataan 'detention' dalam s 83(1) Akta

tersebut sepatutnya ditafsirkan sebagai tidak bertujuan untuk memasukkan penahanan sementara menunggu siasatan selesai (lihat perenggan-perenggan 21–22).]

Notes

For cases on the procedure after arrest, see 5 *Mallal's Digest* (4th Ed, 2001 Reissue) para 615.
For criminal procedure in court for children, see *18 Halsbury's Laws of Malaysia* para [310.541]–[310.556].

Legislation referred to

Child Act 2001 ss 83(1), 84(2), (3), 86(1)
Criminal Procedure Code s 117(1), (2)
Interpretation Acts 1948 and 1967 s 54(2)

Appeal from: Criminal Revision No 43–7 of 2003 (High Court, Kuala Lumpur)

Ahmad Fairuz bin Zainol Abidin (Deputy Public Prosecutor) for the appellant.

Abdul Aziz JCA (delivering judgment of the court):

[1] The question to be decided in the appeal before us, which was the public prosecutor's, was whether the detention of a child for purposes of investigation should be under the Child Act 2001 or under s 117 of the Criminal Procedure Code ('the CPC'). The public prosecutor maintained that it should be under s 117 of the CPC, which provides as follows in sub-s (1) and the first sentence of sub-s (2):

> (1) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of 24 hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making the investigation shall immediately transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and shall at the same time produce the accused before the Magistrate.
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> (2) The Magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorize the detention of the accused in such custody as the Magistrate thinks fit for a term not exceeding fifteen days in the whole ...

[2] The section falls under Part V of the CPC, entitled 'Information to Police and their Powers to Investigate'. At the time a detention is authorized under that section, the case is still at the investigation stage. The detention is to enable investigation to be completed. The person detained is not yet ready to be charged, and no charge would have been drawn up or preferred.

[3] The provisions of the Child Act 2001 that were resorted to or cited in this case are ss 83(1), 84 and 86. Those sections appear in Part X of the Act, entitled 'Criminal Procedure in Court For Children'. Part X consists of four chapters: Chapter 1 (Charge, Bail, etc); Chapter 2 (Trials); Chapter 3 (Powers

of the Court For Children at the Conclusion of the Trial); Chapter 4 (Probation). The titles of Part X and of its four chapters indicate that Part X is concerned with the treatment of a child who is ready to be charged and tried. The three sections are to be found in Chapter 1.

[4] Section 83(1) provides as follows:

> Notwithstanding anything contained in any written law relating to the arrest, detention and trial of persons committing any offence but subject to subsections (3) and (4), a child who is alleged to have committed an offence shall not be arrested, detained or tried except in accordance with this Act.

[5] It may be mentioned, in connection with the arrest, detention and trial of a child having to be 'in accordance with this Act', that the Act provides nowhere else but in Part X for matters concerning the arrest of a child for committing an offence, for his detention following arrest and for his eventual trial.

[6] Section 84 provides as follows:

> (1) If a child is arrested with or without a warrant, the child shall be brought before a Court For Children within 24 hours exclusive of the time necessary for the journey from the place of arrest to the Court For Children.
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> (2) If it is not possible to bring a child before a Court For Children within the time specified in subsection (1), the child shall be brought before a Magistrate who may direct that the child be remanded in a place of detention until such time as the child can be brought before the Court For Children.
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> (3) The Court For Children before whom a child is brought shall inquire into the case and unless —
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> (a) the charge is one of murder or other grave crime;
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> (b) it is necessary in the best interests of the child arrested to remove him from association with any undesirable person; or
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> (c) the Court For Children has reason to believe that the release of the child would defeat the ends of justice,
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> the Court For Children shall release the child on a bond, with or without sureties, for such amount as will, in the opinion of the Court For Children, secure the attendance of that child upon the hearing of the charge, being executed by his parent of guardian or other responsible person.
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> (4) Nothing in this section shall be deemed to affect the powers of a police officer to release the child arrested on bail in accordance with the Criminal Procedure Code.

[7] A Court For Children is a court constituted under s 11, which, according to sub-s (2), 'shall consist of a Magistrate who, in the exercise of his functions as a Court For Children except when making an order under ss 39(4), 42(4), 84(3) or 86(1), as the case may require, shall be assisted by two advisers ...'

[8] The essence of s 84 is that when a child is arrested for an offence he is to be brought within 24 hours before a Court For Children, whereupon he is to be released on a bond pending 'the hearing of the charge' unless para (a), (b) or (c) of sub-s (3) applies, in which case he is not to be released on a bond.

That implies that he has to be detained, but the detention has to be detention pending 'the hearing of the charge' also and not for purposes of investigation. The detention (or remand, to be precise) under sub-s (2) is only detention until the child is brought before the Court For Children, and not for purposes of investigation, and the detention is directed by a magistrate who is not a magistrate of a Court For Children. When a child is brought upon arrest directly to a Court For Children, there can be no question of a detention under subsection (2).

[9] Omitting sub-s (3), sn 86 provides as follows:

> (1) If a child having been arrested and while awaiting trial before a Court For Children is not released under section 84, the Court For Children before whom the child is brought shall cause him to be detained in a place of detention provided under this Act until he can be brought before the Court having jurisdiction unless the Court For Children certifies that:
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> (a) it is impracticable to do so;
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> (b) he is of so unruiy or depraved a character that he cannot be safely so detained; or
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> (c) by reason of his state of health or of his mental or bodily condition it is inadvisable so to detain him.
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> (2) Under the circumstances referred to in paragraph (l)(a), (b) or (c), the Court For Children shall have the power to order the child to be detained —
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> (a) in a police station, police cell or police lock-up, separate or apart from adult offenders; or
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> (b) in a mental hospital, as the case may require.

[10] It complements s 84 and deals with the case of a child who cannot be released under s 84(3) on a bond pending trial and who must, by necessary implication, be detained. It expressly provides for his detention pending trial and is concerned primarily with specifying the place of detention in such cases.

[11] The child in this case was suspected of using the name and identity card number of the complainant to subscribe for Celcom cellular phone services. The complainant took her to a police post, where she was arrested. That was on 13 April 2003. Because investigation could not be completed within 24 hours, on 14 April the police brought the child to the magistrate of a Court For Children with a written application under s 117 of the CPC for her detention for seven days pending investigation. The copy in the record of appeal of the written application, which was typewritten, showed that someone had changed in manuscript the reference to s 117 in the heading to a reference to s 86(1) of the Act. The magistrate made an order that the child be detained for four days on account of s 84(3)(c).

[12] On the same day, 14 April, the magistrate wrote to the High Court applying for a revision of her order, saying in the first paragraph of her letter 'saya mendapati terdapat beberapa perintah yang telah silap diberikan' and, in the second paragraph, that the application that had been before her was one under s 84 of the Act.

[13] An error had certainly been made. As has been stated, the detention under s 86 is detention on the ground that, pending trial, a child cannot be

released on a bond under s 84 and not because investigation cannot be completed within 24 hours. Section 84, as has been stated, is primarily concerned to ensure that, pending trial, a child is released on a bond. In para 3 of her letter to the High Court, the magistrate, relying on para (c) of s 84(3), said that she had reason to believe that the release of the child would defeat the ends of justice. But there was no basis for such belief. The written application of the police did not so claim, and that was because it was not an application for the denial of release on a bond under s 84 but an application for detention pending investigation. Moreover, if a child deserved to be denied release under s 84(3), and therefore deserved to be detained under s 86, the detention cannot be limited to a number of days but must be until the charge is fully heard.

[14] The learned judge of the High Court heard the magistrate's application for revision on 15 April. The child was not represented and did not submit. The DPP submitted that the magistrate had converted the application to one under s 86(1) and made an order under s 84(3)(c), but the application should have been allowed to remain as one under s 117 of the CPC and the order should have been one under s 117. The judge ruled that the magistrate's order was correct in law.

[15] When the appeal came before us on 27 January 2004, the learned DPP informed us that the child had been released after the four days without any charge being preferred against her and that no further proceedings were contemplated against her. He, however, still wished to proceed with the appeal in order to obtain a ruling as to the applicability of s 117 to a child, which ruling, whichever way it might go, would have no effect on the child in this case. We accordingly dispensed with further attendance of the child, who was unrepresented and who would have had nothing to contribute in the appeal. We agreed to hear the appeal and we heard the DPP's submission on 29 January.

[16] In his grounds of judgment the learned judge said that the magistrate converted the application to one under s 84(2), which, as has been seen, was not the case. The core of the judge's grounds for holding that the magistrate's action was correct in law was in these words:

> The issue for deliberation is whether the arrest and detention of a child must be under section 117 as contended by the learned Deputy Public Prosecutor or under the Act as understood by the learned Magistrate. The answer, to my mind, lies in section 83(1) of the Act which reads as follows'. [There then followed the words of section 83(1)]. 'This section makes it manifestly patent that the arrest and detention of a child shall be in accordance with the Act thereby rendering section 117 inapplicable as expressly provided. Unlike section 117 section 84(2) of the Act which deals with the detention of a child does not prescribe any time period for detention."

[17] There then followed a discussion of the period, about which we shall have something to say later.

[18] The judge obviously considered that the magistrate made her order, and correctly, under s 84(2). That was not correct because, as already stated,

she made the order under s 84(3)(c), or rather under s 86(1) by reason of paragraph (c) of s 84(3). Nowhere in his grounds did the judge mention s 84(3)(c) or 86(1). In any case, as already stated, detention under s 84(2) is not for purposes of investigation. It is a remand by reason that it is not possible within 24 hours to bring a child to a Court For Children to be dealt with on the charge against him. It could only happen — and very rarely too, we imagine, if it does happen — where the arrest occurs at a place from which it is not possible to travel to a Court For Children within 24 hours. That being the purpose of the remand, s 84(2) itself provides that the remand is 'until such time as the child can be brought before the Court For Children'. There is no need to fix a time limit. It must be understood that the child must be brought before a Court For Children without unnecessary delay. Moreover, in this case there was no question of an order being made under s 84(2) because the child was brought directly to a Court For Children and the magistrate who dealt with the police application was the magistrate of that court.

[19] What we thought was really of concern to the public prosecutor was the judge's ruling that, by virtue of s 83(1), s 117 was inapplicable to a child. And that was because if that ruling was correct a child could not be detained pending investigation where investigation cannot be completed within 24 hours. Such detention is only available under s 117. There is no provision in the Act for such detention in the case of a child. As has been seen, detention under or by virtue of s 84 or 86 is not detention pending investigation.

[20] The effect of s 83(1) is to prohibit the arrest, detention or trial of a child except in accordance with the Act. The prohibition applies notwithstanding anything contained in any written law. While imposing the prohibition, the section itself does not provide for the arrest, detention or trial of a child. If the word 'detention' were to be understood in a liberal and broad sense, then detention for purposes of investigation would fall within the section and its effect would be to prohibit the detention of a child under s 117 for purposes of investigation while there is no power to detain him for such purposes under the Act.

[21] The DPP, however, argued that since s 83(1) belongs to a Part of the Act, Part X, that deals with 'Criminal Procedure in Court For Children' and not with the investigation of offences alleged to be committed by a child, and since the detention provided for in that Part is detention of a child pending trial or punitive detention after trial, the word 'detention' in s 83(1) should be construed as not being intended to include detention pending investigation. Not having the benefit of contrary argument, and being unable to conceive of any contrary argument that could successfully be raised, we were in agreement with the DPP. We did ask ourselves the question why the scope of the word 'detention' should be curtailed by the mere fact of its being positioned in a Part of the Act that provides for detention for the purposes that we have mentioned and not for purposes of investigation, but we were overwhelmed by the consideration that if Parliament had intended to prohibit the detention of a child beyond 24 hours for the reason that investigation cannot be completed, it would have done so expressly and

would not have relied on the use of the word 'detention' in s 83(1) being construed as intending to include detention for purposes of investigation, to achieve or bring about such prohibition.

[22] Agreeing with the DPP, we allowed the appeal and ruled that s 117 of the CPC is applicable to a child.

[23] One other thing needs to be mentioned. We have said that the wording and operation of s 84(2) are such that it does not require a direction of remand made under it to specify the period of remand. The judge, observing that the section, unlike s 117, does not prescribe the period of remand and obviously thinking that a direction of remand under s 84(2) has to specify the period of remand, said that s 54(2) of the Interpretation Acts 1948 and 1967 governs the determination of the period. Subsection (2) says':

> Where no time is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

[24] The provision is applicable in a situation where one is required to do something but the time within which it has to be done is not prescribed. It answers the question how much time is allowed to one within which to accomplish the thing that is to be done. And the answer is that the thing to be done must be accomplished 'with all convenient speed'. It is not an appropriate provision to assist a detaining authority to decide for how long he may order a person to be detained, because the answer furnished by the provision, that he may detain the person or that the person may be detained 'with all convenient speed', is simply not a logical answer and will not assist him. It might be an appropriate answer to the question — which he does not and need not ask — how much time he is allowed within which to make the detention order, but it certainly does not answer the question for how long he may order the person to be detained.

Order accordingly.

Reported by Lim Lee Na